

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
REGION 9

COVENANT CARE OHIO, INC.
D/B/A WRIGHT NURSING AND
REHABILITATION CENTER ^{1/}

Employer

and

Case 9-RC-17923

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
DISTRICT LODGE 34, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER

The Employer is engaged in the operation of a nursing home and rehabilitation center on Yellow Springs-Fairfield Road in Fairborn, Ohio. The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit comprised of all full-time and regular part-time RNs (registered nurses) and LPNs (licensed practical nurses) employed by the Employer at its Fairborn, Ohio facility, excluding all other employees, all other professionals, all office clerical employees, and all guards and supervisors as defined in the Act. There is no known history of collective bargaining affecting the employees involved in this proceeding.

A hearing officer of the Board held a hearing and the Employer filed a brief with me. ^{2/} The parties disagree with regard to the supervisory status of the RNs and LPNs that the Petitioner seeks to represent. The Employer, contrary to the Petitioner, contends that all of its RNs and LPNs serve as charge nurses and are statutory supervisors as they possess and exercise one or more of the criteria set forth in Section 2(11) of the Act. The Employer also takes the position that the RNs are professional employees and, in the event that they are found not to be statutory supervisors, must be given the opportunity to vote on whether they desire be included in a unit with the LPNs or to be represented separately, in addition to voting on the question of representation. In this regard, I note that the parties stipulated that the RNs are professional employees within the meaning of Section 2(12) of the Act. Finally, the Petitioner has stated a willingness to proceed to an election in any unit found appropriate.

^{1/} The Employer's name appears as amended at the hearing in this matter.

^{2/} The Petitioner made a brief closing statement and elected not to file a brief.

In examining the issues involved here, the record discloses that the Employer's claim that the RNs and LPNs are statutory supervisors is predicated on the assertion that they assign, responsibly direct the work of other employees, transfer employees, reward employees, discipline employees, and have the authority to discharge them. It is not contended, and the record does not reflect, that RN and LPN charge nurses have the authority to hire, lay off, recall, promote employees, or to adjust their grievances.

I have carefully considered the evidence and the arguments presented by the parties on the issues and have concluded, as discussed in detail below, that the record supports the Employer's contention that the RN and LPN charge nurses are supervisors within the meaning of the Act. Accordingly, I shall dismiss the petition. To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. I will then present, in detail, the facts and reasoning that supports each of my conclusions on the issues.

I. OVERVIEW OF OPERATIONS

The Employer operates a 108 bed skilled nursing facility that provides care for long-term residents and short-term rehabilitation patients. The facility is laid out in a square with a courtyard in the middle. Administrative offices are located at the front of the facility near the entrance and there are three interior nurses stations located at three of the four corners of the facility. The facility is divided into three patient or resident care units, referred to in the record as East Wing Short Hall, East Long Hall and West Hall. The East Wing Short hall is the Medicare short-term therapy based unit and the East Long Hall and West Hall are the long-term residential care units. Patients in the short-term therapy unit are generally those who have been released from a hospital and who are recuperating and receiving therapy to enable them to return home.

The Employer's executive director, Tim Miller, is in charge of the day-to-day operation of the facility, and is the highest ranking manager employed in the facility on a daily basis. Miller directly supervises eight managers: (1) Resident Assessment Instrument Director; (2) Business Office Manager; (3) Marketing Director; (4) Social Services Director; (5) Maintenance Supervisor; (6) Dietary Manager; (7) Housekeeping and Laundry Manager; and (8) the Director of Nursing (DON). The DON is Joann Ashcraft and reporting to her is the ADON (Assistant Director of Nursing) Amber Arwood. Working under Ashcraft and Arwood in the nursing department are 2 RNs, 10 LPNs, and approximately 22 State Tested Nurses Aides (STNAs), including two Restorative Nurses Aides (RNAs).

The Employer operates three nursing shifts to provide residents and patients with around the clock care. The three shifts for STNAs are: 7 a.m. to 3 p.m., 3 p.m. to 11 p.m., and 11 p.m. to 7 a.m. The shifts for RNs and LPNs are : 7 a.m. to 3:30 p.m., 3 p.m. to 11:30 p.m., and 11 p.m. to 7:30 a.m. RNAs work only on the first shift. Miller and the Employer's department managers generally work between the hours of 8 a.m. to 6 p.m. Monday through Friday. The DON's regularly scheduled hours of work are from 8 a.m. to between 4 p.m. and 6 p.m. and the ADON's regularly scheduled hours of work are from 8 a.m. to 6 p.m., but both share on-call status duties during their non-working hours.

All of the Employer's RNs and LPNs are employed in the capacity of charge nurse. On the first and second shifts the Employer staffs each hall or unit with a charge nurse, who may be an LPN or an RN, for a total of three charge nurses on each shift. On the third shift there are two charge nurses on duty, one on the West Hall and a second who is in charge of both the East Wing Short Hall and the East Long Hall. Some of the charge nurses are primarily assigned to a particular hall on a daily basis.

Each charge nurse is in charge of the residents and STNAs assigned to her unit during her shift. In addition, the charge nurse assigned to East Wing Short Hall has responsibility for the entire facility. Eight of the approximately 12 nurses in the proposed unit have acted as charge nurses on East Wing Short Hall. The number of STNAs on each shift and in each hall is based in the resident and patient census. At the time of the hearing there were approximately 70 residents and patients at the facility. The State of Ohio mandates staffing levels of one STNA per fifteen residents or 2 hours a day per each resident. However, the Employer seeks to maintain a stricter ratio of one STNA per every 12 residents. This ratio translates to approximately five to six STNAs working between the two main halls on the first and second shifts, and five STNAs working between the two halls on the third shift. Two RNAs also work on the first shift.

STNAs earn between \$9 and \$11 an hour. LPNs are paid between \$16 and \$18 an hour, and RNs receive wages in the range of \$18 to \$21 an hour. The ADON is a salaried employee and earns approximately \$40,000 to \$45,000 a year. All hourly employees are entitled to receive the same benefits, including a uniform policy for leave of absence and medical leave.

STNAs are required to possess only an eighth grade education and complete a 75-hour course to obtain a state license. LPNs are required to complete a course of study at a National League for Nursing (NLN) accredited school, which requires at least 9 months of schooling. In addition, LPNs must take and pass an exam given by the Ohio Board of Nursing to obtain their LPN license. RNs must be educated between 2 and 4 years at an NLN accredited school and also must pass an examination given by the Ohio Board of Nursing to obtain an RN license.

Charge Nurses:

The Employer's charge nurses provide direct nursing care to residents and patients. Charge nurses are also responsible for safety issues, security issues, and employee issues when managers and supervisors, whose managerial supervisory status is not disputed, are not present in the facility. When necessary, charge nurses and other nursing personnel may consult a detailed Policies and Procedures Manual that is kept at each nurses station. The manual, consisting of five volumes, addresses any issue that could reasonably be anticipated to arise in the facility. Moreover, the manual contains job responsibilities and job descriptions for all positions.

At the commencement of their shift, a charge nurse receives a report from the charge nurse whose shift is ending. This report notes anything unusual that occurred during the shift and updates any changes to the conditions of residents and patients. Charge nurses spend much of each shift making medication rounds. Two medication passes are made on the first and third

shifts and three medication passes are made on the second shift. During medication passes, the charge nurses pass medication, dietary supplements, and observe each resident and patient and their surroundings to ensure that they are receiving proper care. For example, charge nurses check to see that residents have been turned and bathed according to their individualized bathing and turn schedules. Charge nurses also check to ensure that the STNAs have fed the residents, obtained their vital signs, changed them, and brushed their teeth. The Employer holds charge nurses responsible for ensuring that STNAs and RNAs are providing acceptable care to residents. A failure by a charge nurse to properly correct or counsel an STNA/RNA with deficient performance may result in the charge nurse being disciplined, but there is no evidence that this has occurred.

In addition to the above duties, charge nurses have charting responsibilities. These responsibilities include documenting showers and skin conditions, treatments performed, making nurses' notes on patient conditions, tracking chargeable items in a charge sheet book, and noting in a separate book medications that need to be reordered. Charge nurses also communicate with physicians and families regarding the care of residents.

Besides their work-related contact with STNAs and RNAs, charge nurses have work related contact with dietary, maintenance, housekeeping and laundry employees on a daily basis. For example, charge nurses obtain dietary supplements from dietary personnel that are used for their med passes. They may also direct other employees to perform certain maintenance tasks or to provide linens, towels, or other housekeeping items to residents.

STNAS and RNAS:

STNAs perform most of the direct care of residents and patients. In this regard, they are responsible for all of the resident's daily needs. These needs include bathing or showering, ambulating, changing, eating, turning, obtaining vitals, removing and replacing soiled linens, and cleaning and maintaining each resident's room and living environment. STNAs also perform treatments as ordered by physicians. RNAs focus on performing lower physical rehabilitation functions. These include range of motion exercises and assisting with feedings.

Responsible Direction, Assignment of Work, Transfers:

The record discloses that the STNAs are assigned to specific rooms and residents by the scheduler Lisa Williams, who is also a STNA. Williams prepares monthly and daily schedules for the STNAs. Although the record is not entirely clear on this point, it appears that the daily schedules, which are usually available for that day and the following day or weekend days, contain detailed information including the rooms and residents to which each STNA is assigned. The nurses, including all charge nurses, are scheduled monthly by the DON or the ADON. Much of the STNAs' daily routine involves hands on resident and patient care. It appears that a substantial portion of the work performed by the STNAs, such as bathing and turning residents, is of a routine nature and covered by written guidelines and/or the daily schedules. On occasion, a charge nurse may instruct a STNA to complete or to perform a task that the charge nurse deems necessary. If a charge nurse notes that a resident is off his or her turn schedule, needs changing,

or requires a physician ordered treatment, the charge nurse may direct a STNA to handle the situation.

STNAs are encouraged to work independently. In this regard, they are encouraged to set their own priorities and work their own assignments. However, there is an occasional question as to the scope of each STNAs shift assignment. On these occasions the STNAs frequently decide amongst themselves who will “float” and who will cover certain hall assignments. Charge nurses intervene when the STNAs request assistance in dividing the work load.

STNAs on each hall seek approval from their respective charge nurses to take their breaks. Breaks must be coordinated to maintain continuity of resident care. Sometimes, charge nurses delay a STNA’s break to ensure patient care is prioritized. Charge nurses on occasion transfer STNAs from one hall to another to ensure that there is sufficient staffing to meet minimum coverage requirements and resident needs. In making these temporary transfers, charge nurses first seek volunteers, but they have the authority to mandate such transfers in the absence of volunteers. The record, however, does not contain any specific examples of charge nurses mandating such transfers.

Although there is conflicting testimony, it appears that charge nurses utilize a list to call employees and ask them to report to cover for an absent co-worker or when there has been a sudden change in the resident census requiring additional personnel. However, charge nurses cannot order employees into work. If charge nurses are unsuccessful in obtaining a replacement from the employee list maintained at each nurses station they could, until recently, telephone a temporary agency to obtain a substitute. It is not clear whether this procedure is uniform as one LPN testified that she is required to call the on-call nurse or Lisa Williams to obtain a replacement for an employee who does not show up to work the third shift. Another charge nurse testified that if she is unable to obtain a replacement employee from the list maintained by the Employer, she is to call Williams, the DON or the ADON and if a replacement still cannot be located, only then is the charge nurse to contact a temporary agency. As noted above, DON Ashcraft or ADON Arwood share the on-call duties. They are available to obtain replacement personnel and to assess IVs as needed. An RN license is required to make such an assessment.

Charge nurses sign sick time requests if an employee becomes ill during a shift. However, it appears that they do not have the authority to deny a request unless instructed to do so by an undisputed supervisor or manager. They also record employee call offs on “absence report” forms. Charge nurses adjust employees’ time for pay purposes when, for some reason, the employee did not use the Employer’s electronic timekeeping system. By signing a written time adjustment for an employee, the charge nurse verifies that the employee, in fact, worked the time claimed.

STNAs and RNAs often submit vacation requests through charge nurses. However, the charge nurses do not act on these requests, but merely forward them to the ADON or the DON for approval.

Discipline and Discharge:

Charge nurses have the authority to issue verbal and written warnings to employees working on their shift. They have exercised this authority and have the discretion to issue such discipline or to issue a performance improvement plan to an employee. The performance improvement plan may act as a precursor to further discipline. If disciplinary action beyond a written warning is indicated, the charge nurse reports any infractions to an admitted supervisor or manager or the Employer, often the DON or ADON, who then conducts an investigation to determine whether further discipline is warranted.

On at least some occasions, verbal and written warnings issued by charge nurses have been considered in determining more severe discipline for an employee, including discharge. For example, while serving as a charge nurse, RN Patty Mattachione issued verbal counselings and two written warnings, one in November 2002 and another in January 2003, to STNA Shawna Tibbs for being argumentative and insubordinate, respectively. Mattachione also issued a written warning to Lisa Willoughby, one of Tibbs' co-workers, for engaging in the same conduct that resulted in the first warning to Tibbs. Mattachione issued these counselings and warnings without seeking prior approval from any supervisor. On another occasion, Mattachione disciplined Tibbs by clocking her out and sending her home because Tibbs could not control herself during an emotional outburst. The Employer later discharged Tibbs. The DON considered the warnings issued to Tibbs by Mattachione in reaching her determination to discharge Tibbs.

In July 2003, Mattachione issued a written warning to Willoughby for tardiness. Mattachione testified that employees are not automatically issued written warnings for tardiness and that she determined to issue a warning to Willoughby because Willoughby had been habitually late and had received several verbal warnings about tardiness from Mattachione and from other nurses. The Employer subsequently discharged Willoughby, purportedly for resident abuse. The record reflects that prior verbal and written warnings issued by charge nurses were considered in DON Ashcraft's decision to discharge Willoughby.

On some occasions Mattachione has elected not to discipline employees for tardiness. She judges each situation on its own merits to determine whether discipline is warranted. For example, if an employee is late for the first time or has been late infrequently she will likely only speak to the employee about tardiness. Additionally, if an employee gives a couple hours notice that they will be tardy Mattachione will not write up the employee, presumably if the employee does not otherwise have a history of chronic tardiness.

Although they were not made part of the record, Mattachione testified that she issued written warnings to other mostly unidentified STNAs in her capacity as a charge nurse. In this regard, she recalled issuing yet another written warning to STNA Tibbs for insubordination when Tibbs took a break contrary to Mattachione's directive.

The Employer utilizes a form titled "performance improvement plan" that describes an area or areas of an employee's performance that needs improvement. The failure of the employee to make the required improvement within a specified timeframe results in the issuance

of discipline to the employee. The record contains an example of a performance improvement plan signed by LPN Joy Haerr in the space for a supervisor's signature. However, Haerr did not testify and the circumstances behind her signing this document are not known. Mattachione testified that on several occasions she elected to issue a performance improvement plan to an employee rather than disciplinary action and that a performance improvement plan was a lesser form of action putting an employee on notice of a need to improve or face disciplinary action.

Most of the evidence involving discipline of STNAs by charge nurses emanates from Mattachione. In this regard, she testified to having issued 20 to 30 disciplinary actions to employees and of these 10 to 12 were written warnings. However, the record contains documentary evidence indicating that other charge nurses have also disciplined employees. LPN Marsha Morton issued a disciplinary action notice to STNA Jamie Wheeler on May 26, 2004. Wheeler refused to sign the form and did not return to work for the Employer. The record does not disclose whether Morton exercised independent judgment in issuing this discipline. Similarly, LPN Cliff Wheeler issued a disciplinary action notice to a nursing department employee on July 6, 2003 for tardiness. Once again, however, the record does not disclose what, if any, independent judgment was exercised by Wheeler in issuing such discipline.

RN Susie Seitz issued a written warning to STNA Tammy Jones on October 21, 2003, when Jones failed to answer residents' call lights in a timely manner. Seitz, however, did not testify and the details surrounding the issuance of this warning are not specifically disclosed on the record. The undisputed record testimony discloses that charge nurses are authorized to issue verbal and written warnings to nursing department personnel at their discretion, without seeking approval from their superiors, and that on at least some occasions they have done so.

Charge nurses also have the authority to issue verbal and written warnings to non-nursing personnel such as housekeeping, laundry, dietary and maintenance employees. RN Mattachione provided specific testimony of such discipline. Mattachione testified that on one occasion a dietary aide refused to provide her with a gallon of health shake and only complied after Mattachione obtained the health shake herself after the dietary aide had rebuffed an STNA that Mattachione had dispatched to obtain it. Mattachione described a similar problem with the same dietary aide when her request, through an STNA, for a particular food item was refused. On this second occasion, Mattachione issued a written warning to the dietary aide without the approval or involvement of the aide's dietary manager. Mattachione reported similar problems with at least two other dietary aides and verbally counseled those aides, cautioning them that additional infractions could result in written warnings.

Executive Director Miller testified that charge nurses have the authority to discharge employees on the spot. However, there is no evidence that this ostensible authority was ever communicated to charge nurses and there is no evidence that a charge nurse has ever discharged an employee. There was, however, testimony that charge nurses are authorized to immediately suspend employees during a shift for such reasons as insubordination or being under the influence of drugs or alcohol. This authority was communicated to charge nurses by the then DON at the facility and is also apparently implied in the Employer's Policies and Procedures Manual, but the actual documents are not part of the record. Finally, the record shows that when

a charge nurse suspects an employee of drug abuse, she can require the employee to report to a local emergency room for a mandatory drug test.

Reward:

Substantial record testimony was devoted to the authority of charge nurses to affect earnings by selecting personnel from a list of available employees to work overtime and by offering shift bonuses to employees who were willing to work extra shifts. However, on June 16, 2004, Executive Director Miller severely circumscribed this authority by implementing a policy that no overtime will be authorized without his express permission. Prior to that time, charge nurses could call employees from the list of available employees and offer substantial bonuses to entice them to report for extra shifts. STNAs were offered a standard bonus of \$25 per each extra half shift and \$50 per each extra full shift worked and nurses were offered a standard bonus of \$50 per each extra half shift and \$100 per each extra full shift worked. However, charge nurses had the authority, which some exercised, to offer higher shift bonuses. For example, one STNA was offered a bonus of \$100 by a charge nurse to work an extra full shift. The charge nurse offered this bonus without seeking authorization from an undisputed supervisor or manager. It appears, however, that charge nurses no longer have such broad discretion to offer employees overtime hours or bonuses without the express approval of Miller.

Charge nurses do not prepare performance evaluations for STNAs and RNAs. However, they informally participate in the evaluation process by providing feedback to the DON and ADON when requested to do so. Disciplinary action and performance improvement plans issued to STNAs and RNAs by charge nurses are considered by the DON and ADON in connection with the preparation of STNA and RNA evaluations.

Secondary Indicia:

The Employer's charge nurses have other duties and responsibilities that, while not confirming supervisory status alone, are viewed by the Board as secondary indicia (circumstantial evidence) that such status exist. Thus, the charge nurses have keys to the facility and to supply and controlled substance areas. They keep track of employees' time when they are unable to use the Employer's electronic system; they complete and forward employee time off requests; and, they report employee call offs for illness and other reasons. The record also discloses that charge nurses have recently begun to attend weekly supervisory meetings conducted by Executive Director Miller.

Perhaps the most significant secondary indicia is the amount of time that the Employer's facility would be left without any on-site supervision if the charge nurses are not found to be statutory supervisors. In this regard, the record shows that all of the Employer's uncontested supervisors or managers work between 8 a.m. and 6 p.m. Monday through Friday. Although the DON and ADON remain on-call during their non-working hours, the highest management official on site, for a majority of the 24 hours, 7 days a week, in which the Employer's facility must be staffed is a charge nurse(s).

II. THE LAW AND ITS APPLICATION

Before analyzing the specific duties and authority of charge nurses, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of “supervisory authority” in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 949 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the charge nurses possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Such “minor supervisory duties” do not deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 NLRB 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

The burden of proving supervisory status lies with the party asserting that such status exists. *Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB No. 99, slip op. at 2 (2003); *Michigan Masonic Home*, 332 NLRB at 1409. As a general matter, I observe that for a party to satisfy the burden of proving supervisory status,

it must do so by “a preponderance of the credible evidence.” *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in the favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Petitioner asserts that the Employer’s charge nurses are not supervisors within the meaning of Section 2(11) of the Act. In this regard, the Petitioner asserts that forms signed by charge nurses, such as “time adjustment” forms, are merely reportorial devices and that charge nurses do not have the authority to approve or disapprove time off requests for employees. The Petitioner further asserts that other forms introduced by the Employer are merely standardized forms produced by a third party and that the supervisory signature line on such forms is not facility specific and does not necessarily imply that the individual signing the form is, in fact, a supervisor. Finally, the Petitioner contends that the Employer failed to meet its burden to establish that the charge nurses are supervisors because the testimony was generalized and lacking in specific evidence to establish the existence of one or more of the criteria set forth in Section 2(11) of the Act.

Contrary to the Petitioner, the Employer asserts that the charge nurses possess certain supervisory indicia. Specifically, as I have previously noted, the Employer contends that the charge nurses responsibly direct the work of other employees, including STNAs, assign employees with independent judgment via their authority to ensure appropriate staffing and to transfer STNAs to another unit assignment during the course of a shift, and that they discipline employees utilizing independent judgment. The Employer contends additionally that charge nurse supervisory status is evidenced by their authority to approve employees’ time adjustments, time off, and to record their absences.

The specific criteria relied on in evaluating that the charge nurses are supervisors are detailed in the following analysis:

Responsible Direction, Assignment, Transfers:

With respect to responsible direction and assignment, the record reflects that the charge nurses are the highest-ranking employees on the premises for more than two-thirds of the time. Thus, they are required to make adjustments to employees’ work assignments and staffing to accommodate resident needs. The record reflects that charge nurses direct STNAs and RNAs to perform certain resident related tasks, cease a particular task and perform another, and to delay their personal breaks to attend to patient needs. Additionally, the record establishes that charge

nurses may transfer STNAs and RNAs from one hall or work assignment to another to address resident needs. The charge nurse sometimes mandates such temporary transfers based on an independent assessment of the STNAs available taking into consideration the STNAs skills and abilities relating to the assignment. The record reflects generally that charge nurses are held responsible by the Employer for the work performed by the STNAs and RNAs working under them on their respective shifts. These facts militate in favor of a finding that the Employer's charge nurses are statutory supervisors. Militating against such a finding is the record evidence that the tasks performed by the STNAs and RNAs are for the most part routine and involve basic care functions such as feeding, toileting, bathing, and turning of non-ambulatory residents. Additionally I note that the scope of their duties is somewhat circumscribed by detailed schedules, instructions, and the Employer's policies and procedures.

With regard to the assignment and direction described above, and discussed in more detail in the factual portion of this decision, I find that the authority exercised by the charge nurses indicates supervisory control and indicia. Thus, the record shows that charge nurses responsibly direct the work assignments of other employees rather than merely the manner in which they perform their tasks. Moreover, the record shows that charge nurses use independent judgment to responsibly direct other employees.

Discipline:

With regard to the authority to discipline employees, I note that the record clearly discloses that charge nurses have the authority, which they regularly exercise, to issue performance improvement plans, and verbal and written warnings to STNAs, RNAs, and laundry, housekeeping, maintenance, and dietary employees. It is well settled that the independent and discretionary issuance of lower level discipline that may lead to more severe discipline constitutes authority to discipline within the meaning of Section 2(11) of the Act. *Superior Bakery*, 294 NLRB 256 (1989); *Illinois Veterans Home*, 323 NLRB 890 (1997). Here, charge nurses issue the warnings not merely when there is a bright-line violation of an established policy, but also when the nature of the offense, such as insubordination toward a charge nurse, requires the exercise of independent judgment. Charge nurses also exhibit independent judgment when they determine not to issue discipline by issuing a performance improvement plan in lieu of discipline or by excusing an employee's tardiness. Moreover, charge nurses exercise independent judgment when determining whether to issue verbal and written warnings to employees and these warnings are generally not subjected to independent review by higher-ranking supervisors or managers. Finally, while the instances of such discipline resulting or contributing to more severe discipline are few, it is clear that the Employer has discharged employees based, in part, on the existence of a prior disciplinary record of verbal and written warnings established by disciplinary action meted out by charge nurses.

Other record evidence detailing the disciplinary authority of charge nurses is consistent with the conclusion that they exercise statutory authority in this area. Although the record lacks specific examples, there is no evidence to contradict the record assertions that charge nurses may suspend employees on the spot for disciplinary infractions and that they may require the offending employee to report to a local emergency room for drug testing if the charge nurse suspects drug abuse. This evidence, in conjunction with specific evidence that charge nurses

issue verbal and written warnings, firmly supports the conclusion that they are statutory supervisors.

Reward:

Prior to the date of Executive Director Miller's memorandum regarding overtime charge nurses exercised considerable discretion with regard to whom to call to work overtime hours and with regard to offering bonuses to work extra shifts. However, Miller's memorandum effectively eliminated charge nurse discretion in this area. Additionally, there is no evidence that charge nurses play a significant role in the evaluation process. Although they may be asked for their opinion regarding an employee's performance, there is no evidence that they make effective recommendations for promotions or wage increases. In this regard, I note it is well-settled that the authority to simply evaluate employees without more is insufficient to find supervisory status. *Passavant Health Center*, 284 NLRB 887, 891 (1987); *Somerset Welding & Steel, Inc.*, 291 NLRB 913, 914 (1988); *The Mount Sinai Hospital*, 325 NLRB 1136 (1998). Accordingly, I conclude that the evidence does not show that charge nurses exercise supervisory authority with regard to the reward criterion set forth in Section 2(11) of the Act.

III. CONCLUSION

Based on the charge nurses responsibilities to assign and responsibly direct the work of the STNAs, RNAs, and other employees, their involvement in disciplining employees, and the existence of several secondary indicia militating in favor of supervisory status, I find that the RN and LPN charge nurses sought by the Petitioner are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I will dismiss the petition. In this regard, the record discloses that charge nurses use independent judgment in disciplining employees and in determining whether discipline is warranted. See, *Superior Bakery*, supra; *Illinois Veterans Home*, supra. Additionally, they use independent judgment in determining patient and hall assignments for STNAs and RNAs, altering break schedules as needed, and excusing STNA and RNA tardiness for good cause, and in directing STNAs to perform certain discrete tasks and modifying their assignments. See, *Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972); *Demco New York Corp.*, 337 NLRB No. 135 (2002); *Avon Convalescent Center*, 200 NLRB 702, 706 (1972). ^{3/}

IV. CONCLUSIONS AND FINDINGS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

^{3/} In view of my conclusion that the charge nurses are supervisors based on the supervisory indicia discussed in detail in the decision, I find it unnecessary to determine whether the charge nurses possess any other supervisory indicia in Section 2(11) of the Act.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The Petitioner is a labor organization within the meaning of the Act and claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of the individuals whom the Petitioner seeks to represent within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act because the individuals that constitute the entire unit sought by the Petitioner, the Employer's RN and LPN charge nurses, are supervisors within the meaning of Section 2(11) of the Act.

V. ORDER

IT IS HEREBY ORDERED that the petition in this matter be, and it hereby is, dismissed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by 5 p.m., EDST on **October 22, 2004**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 8th day of October 2004.

/s/ Gary W. Muffley

Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

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